Supreme Court, U.S.
FILED
JUL 19 2002
OFFICE OF THE CLERK

(2)

NO. 01-1879

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

GUN OWNERS ACTION LEAGUE, INC., ET AL.,
Petitioners,

v.

JANE SWIFT, ACTING GOVERNOR, COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

STATE RESPONDENTS' BRIEF IN OPPOSITION

THOMAS F. REILLY
Attorney General
of Massachusetts

THOMAS A. BARNICO*
ADAM SIMMS
DEIRDRE RONEY
Assistant Attorneys General
1 Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-2200, ext.2086
**Counsel of Record*

---

22 pp

Question Presented

Whether a Massachusetts law regulating the ownership and possession of firearms in the state, which includes a provision prohibiting shooting at a target with a human image at certain gun clubs, other than such shooting by public safety personnel, violates the Free Speech Clause of the First Amendment.

List of Parties

All parties to the proceeding are correctly identified in the petition for a writ of certiorari.

Table of Contents

Question Presented i

List of Parties ii

Table of Authorities v

Opinions and Orders Below 1

Jurisdiction 1

Constitutional Provision and Statutes Involved 1

Statement of the Case 3

Proceedings in the Court Below 3

Statement of Facts 5

Argument 8

I. THIS CASE PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW REQUIRING RESOLUTION BY THIS COURT, BUT ONLY THE APPLICATION OF SETTLED RULES OF LAW TO THE PARTICULAR FACTS HERE. 8

A. The First Circuit Assumed Without Deciding That Shooting At Targets With Human Images Is Expressive Conduct Entitled To Some Degree of First Amendment Protection.. 9

B. The First Circuit Applied A Settled Standard In Determining That The Act Is Content Neutral and Satisfies Intermediate Scrutiny. 10

II. THERE IS NO CONFLICT OF DECISIONS TO WARRANT CERTIORARI. 13

III. THE MASSACHUSETTS STATUTE AT ISSUE IN THIS CASE IS NOT A MATTER OF NATIONAL IMPORTANCE OR APPLICABILITY. 13

Conclusion 14

Table of Authorities

Cases

Clark v. Community for Creative Non-Violence,
468 U.S. 288 (1984) 4, 5, 8, 11

Commonwealth v. Appel,
547 Pa. 171; 689 A.2d 891 (1997) 12

Commonwealth v. Hodge,
386 Mass. 165; 434 N.E.2d 1246 (1982) 12

Commonwealth v. Hughes,
536 Pa. 355; 639 A.2d 763 (1994) 12

Commonwealth v. Sampson,
383 Mass. 750; 422 N.E.2d 450 (1981) 8

People v. Nowos,
2001 W.L. 736732 (Mich. Ct. App. 2001),
app for lv. to app. den., 643 N.W. 2d 573 (2002) 12

Rice v. Sioux City Memorial Park Cemetery,
349 U.S. 70 (1955) 13

Texas v. Johnson,
491 U.S. 397 (1989) 4, 9

United States v. O'Brien,
391 U.S. 376 (1967) 4, 8

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 4, 8, 10, 11

Williamson v. Lee Optical Co.,
348 U.S. 483 (1954) 11

Statutes

18 U.S.C. § 922 6

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 4

28 U.S.C .§ 1331 1

Mass. G.L. c. 140, § 121 6

Mass. G.L. c. 140, § 129B 6

Mass. G.L. c. 140, § 131(a) - (f) 1, 6, 7

Mass. St. 1906, c. 172 6

Rules and Regulations

Sup. Ct. R. 10 9

Sup. Ct. R. 10(b) 13

Sup. Ct. R. 10(c) 10, 13

Sup. Ct. R. 14(i)(a) 3

Sup. Ct. R. 35.3 3

Fed. R. Civ. P. 12(b)(1) and (6) 3

Opinions and Orders Below

The opinion of the First Circuit Court of Appeals is published at 284 F.3d 198 and is reproduced in the appendix to the petition ("Pet. App.") at 1a. The opinion of the District Court, Pet. App. 38a, is unpublished.

Jurisdiction

On March 25, 2002, the First Circuit Court of Appeals rendered judgment affirming the District Court's order dismissing the complaint. Pet. App. 36a. The District Court had jurisdiction under 28 U. S. C. § 1331. This Court has jurisdiction of the petition under 28 U. S. C. § 1254(1).

Constitutional Provision and Statutes Involved

The United States Constitution, Amendment One, provides, in pertinent part:

Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

Massachusetts G.L. c. 140, § 131, provides, in pertinent part:

All licenses to carry firearms shall be designated Class A or Class B, and the issuance and possession of any such license shall be subject to the following conditions and restrictions:

(a) A Class A license shall entitle a holder thereof to purchase, rent, lease, borrow, possess and carry:

(i) firearms, including large capacity firearms, and feeding devices and ammunition therefor, for all lawful purposes, subject to such restrictions relative to the possession, use or carrying of firearms

as the licensing authority deems proper; and (ii) rifles and shotguns, including large capacity weapons, and feeding devices and ammunition therefor, for all lawful purposes; provided, however, that the licensing authority may impose such restrictions relative to the possession, use or carrying of large capacity rifles and shotguns as it deems proper. A violation of a restriction imposed by the licensing authority under the provisions of this paragraph shall be cause for suspension or revocation and shall, unless otherwise provided, be punished by a fine of not less than $1,000 nor more than $10,000; provided, however, that the provisions of section 10 of chapter 269 shall not apply to such violation.

The colonel of state police may, after an investigation, grant a Class A license to a club or facility with an on-site shooting range or gallery, which club is incorporated under the laws of the commonwealth for the possession, storage and use of large capacity weapons, ammunition therefor and large capacity feeding devices for use with such weapons on the premises of such club; provided, however, that not less than one shareholder of such club shall be qualified and suitable to be issued such license; and provided further, that such large capacity weapons and ammunition feeding devices may be used under such Class A club license only by such members that possess a valid firearm identification card issued under section 129B or a valid Class A or Class B license to carry firearms, or by such other persons that the club permits while under the direct supervision of a certified firearms safety instructor or club member who, in the case of a large capacity firearm, possesses a valid Class A license to carry firearms or, in the case of a large capacity rifle or shotgun, possesses a valid Class A or Class B license to carry firearms. Such club shall not permit shooting at targets that depict human figures, human effigies, human silhouettes or any human images thereof, except by public safety personnel performing in line

with their official duties.

Statement of the Case

Proceedings in the Court Below

This case is a facial challenge to a Massachusetts law entitled, an Act Relative to Gun Control in the Commonwealth, effective October 21, 1998 (the "Act"). In their complaint, petitioners sought declaratory and injunctive relief to declare unconstitutional a significant portion of the Act on the grounds, inter alia, that the Act violates the Due Process Clause, Equal Protection Clause and other federal constitutional provisions.[1] The sole basis for the petition in this Court, however, is the petitioners' claim that the Act's prohibition against shooting a high capacity weapon at a target with a human figure or effigy, in Class A-licensed gun clubs, violates the right to free speech secured by the First Amendment to the United States Constitution. The complaint names as defendants the Acting Governor, the Attorney General, and various law enforcement officials of Massachusetts.[2]

On September 28, 2000, the District Court granted respondents' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (6), ruling that the complaint failed to state a claim upon which relief can be

---

[1] Petitioners have not pursued their Due Process or Equal Protection claims in this Court and, hence, these claims should be deemed waived. Sup. Ct. R. 14(1)(a).

[2] Pursuant to Sup. Ct. R. 35.3, Thomas Foley, as successor in office to John DiFava as Colonel of the State Police, has been automatically substituted as respondent in this case.

granted. Pet. App. 38a. Specifically, with respect to petitioners' free speech claim, the District Court held that "[t]he Act's regulation of shooting at targets shaped like human beings addresses conduct, not expression," citing this Court's decision in *United States v. O'Brien*, 391 U.S. 367 (1967). Pet. App. 39a. The District Court entered an order of dismissal on the same date. Pet. App. 41a.

Petitioners appealed pursuant to 28 U.S.C. § 1291. On March 25, 2002, the Court of Appeals for the First Circuit issued a decision affirming the District Court. Pet. App. 1a. Noting petitioners' claim that shooting at targets with human images is expressive conduct analogous to the flag-burning this Court considered in *Texas v. Johnson*, 491 U.S. 397 (1989), the First Circuit assumed without deciding that such shooting "is expressive conduct entitled to some degree of First Amendment protection." Pet. Att. 25a. On this assumption, the First Circuit proceeded to consider whether the Massachusetts statute is content-neutral or content-based, applying this Court's holding in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), that the "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." The First Circuit held that Massachusetts' rationale for the ban on shooting at targets with human images - that a "person who has practiced shooting at a human-shaped target will likely be more proficient at shooting humans than a person who has had to practice at a circular target"- is "a believable, reasonable, content-neutral justification for the provision." Pet. App. 25a.

Having concluded that the Act is content-neutral, the First Circuit next considered whether it satisfies intermediate scrutiny as being "narrowly tailored to serve a significant governmental interest, and allows for reasonable alternative channels of communication," citing this Court's decisions in *Ward v. Rock Against Racism* and *Clark*

v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). Pet. App. 26a. The First Circuit concluded that the Act serves a significant governmental interest in that it "aims to prevent those who do not have a license for using large capacity weapons from refining their skills with such weapons by shooting at targets depicting humans." Pet. App. 26a. It further concluded that since the restriction applies only in Class A licensed gun clubs, "because those are the only places where a person who does not have a license for large capacity weapons may shoot such weapons," the restriction on shooting at human image-like targets is narrowly tailored. Pet. App. 27a. Finally, the First Circuit found that there are "reasonable alternative channels of communication" for any message petitioners seek to convey by shooting at targets with a human image, including writing, the Internet, word of mouth, other communication technologies, and destruction of images of tyrants "by hand or other physical means" and even by shooting at such images "at any place where they can lawfully shoot at targets, other than gun clubs with a Class A license." Pet. App. 27a-28a. The First Circuit therefore concluded that the Act's provisions restricting target shooting at specific gun clubs "comply with all constitutional requirements for content-neutral restrictions on speech, and hence pass intermediate scrutiny." Pet. App. 28a.

Statement of Facts

Petitioners include, among others, Gun Owners' Action League, Inc. ("GOAL"), which represents both individual gun owners and gun clubs throughout Massachusetts. Petition for a Writ of Certiorari (hereafter "Pet.") at 2-3. The respondents are the Acting Governor, the Attorney General, and the Colonel of the State Police, who collectively enforce the Act in Massachusetts. Respondents

Middlesex County District Attorney and the Lowell Police Chief enforce the Act in localities where several petitioners reside. Id.

Contrary to the petitioners' assertion, the Act does not "radically criminalize previously-lawful conduct." Pet. at 4.[3] Indeed, possession of firearms in Massachusetts has been subject to licensing for nearly a century. Mass. St. 1906, c. 172 (requiring license for carrying a loaded pistol). In essence, the Act changed the previous two-tier licensing system into a three-tier system by adding a separate category for large capacity weapons. Under the prior statutory regime, in order to lawfully possess a firearm, one had to obtain either a license to carry firearms or a firearms identification card. This requirement is retained by the Act. However, the Act now provides for two types of licenses to carry: a Class A license for any type of "large capacity" weapon and a Class B license for a large capacity rifle or shotgun. Mass. G.L. c. 140, § 131(a)(b).[4]

As was the case under the prior Massachusetts statute, unless an applicant falls within one of the statutory exemptions, the licensing authority must issue a firearms identification card to the applicant. Mass. G.L. c. 140, § 129B.[5] Similarly, the standards for obtaining a

---

[3] The First Circuit's decision contains a more comprehensive discussion of the relevant provisions of the Act. Pet. App. at 2a-8a.

[4] The term "large capacity weapon" is defined in Mass. G.L. c. 140, § 121. Although the petitioners below claimed that this term is unconstitutionally vague, they have not included such a claim in their petition in this Court.

[5] The state statutory disqualifications for both a firearms identification card and a license to carry are identical. These disqualifications are also virtually identical to those in the corresponding federal law, see 18 U.S.C. § 922(d)(1)-(9), as follows:

Class A license or a Class B license under the Act are essentially unchanged. The Act did, however, add two new statutory disqualifications – one for persons subject to a current abuse prevention order and the other for persons subject to an outstanding arrest warrant. Mass. G.L. c. 140, § 131(d)(vi), (vii). As was the case under the prior statute, even if no express disqualification applies, the licensing authority may nonetheless refuse to issue a Class A or Class B license upon a finding that the applicant is not a "suitable person" or that the applicant does not have a legitimate need for the license. Id. A licensing authority must state its reasons in writing for denying a license to carry, which decision is subject to judicial review. Mass. G.L. c. 140, § 131(e), (f).

The Act further provides that the colonel of the Massachusetts State Police may grant a Class A license to a gun club with an on-site shooting range, provided that the club is incorporated under the laws of Massachusetts and at least one shareholder thereof is suitable to be issued a Class A license. Mass. G.L. c. 140, § 131(a). A gun club with a Class A license may, in turn, allow persons who do not possess a Class A license to fire a large capacity weapon, provided that person is under the direct supervision of a certified firearms safety instructor or a club member who does have a Class A license. Id. The prohibition on shooting at targets that depict human figures, human effigies, human silhouettes and the like, only applies at gun clubs with a Class A license. Id. Hence, petitioners are free to circulate a newsletter or circular with whatever picture or message

---

persons (i) convicted of a felony; (ii) with a history of mental illness; (iii) with a history of drug or alcohol abuse; (iv) under the age of 21; (v) an alien; (vi) currently subject to a domestic restraining order; or (vii) currently the subject of an outstanding arrest warrant. Mass. G. L. c. 140, §§ 129(B) & 131(d).

they like. Pet. App. at 27a-28a.[6]

Argument

I. This Case Presents No Important Question of Federal Law Requiring Resolution by this Court, but Only the Application of Settled Rules of Law to the Particular Facts Here.

In ruling that the Commonwealth's statutory prohibition against shooting at human image targets in Class A-licensed gun clubs does not violate the First Amendment, the First Circuit applied the legal standards established by this Court for First Amendment challenges to expressive conduct, first assessing whether such shooting is sufficiently communicative to constitute expression protected by the First Amendment, and second, determining whether the law forbidding such shooting is content-neutral or content-based. Pet. App. 23a-28a (*citing U.S. v. O'Brien*, 391 U.S. at 376, *Texas v. Johnson*, 491 U.S. at 404, *Ward v. Rock Against Racism*, 491 U.S. at 791, and *Clark v. Community for Creative Non-Violence*, 468 U.S. at 293). In accordance with this Court's decision in *O'Brien,* the First Circuit assumed without deciding that shooting at targets with human images is sufficiently expressive conduct to be entitled

---

[6] Petitioners' claim that "[t]here are no scienter requirements" under the Act is both wrong as a matter of state law and irrelevant. Pet. at 4. Massachusetts' highest court has held that the wrongful possession of a firearm under state law does contain a knowledge requirement. *Commonwealth v. Sampson*, 383 Mass. 750, 762, 422 N.E.2d 450, 456-7 (1981). Moreover, petitioners have not preserved this or any other due process question in their petition in this Court.

to some degree of First Amendment protection. Pet. App. 25a. The First Circuit concluded, however, that the restriction imposed on such conduct under the Act is content-neutral and that it satisfies the intermediate scrutiny standard.

Although the petitioners disagree with the result the First Circuit reached, they do not dispute the correctness of the rules of law applied by that court; indeed, petitioners invoke the same legal rules from the same cases of this Court, in urging this Court to grant their petition. Thus, the question presented by the petition is merely whether the settled legal standards were correctly applied to the statute challenged in this case – that is, whether or not the First Circuit correctly decided that the challenged provision is content-neutral and satisfies the intermediate scrutiny standard. As such, this case is not an appropriate subject for review by this Court. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

A. The First Circuit Assumed Without Deciding That Shooting At Targets With Human Images Is Expressive Conduct Entitled To Some Degree of First Amendment Protection.

The issue that petitioners urge this Court to review is whether shooting at targets with a human image is expressive conduct protected by the First Amendment. Hence, much of the petition consists of argument that such shooting is "a significant form of political expression." Pet. at 7. Petitioners assert that there is "a long tradition of shooting at targets of historical tyrants," id. at 8, and analogize such shooting to the burning of the American flag, which this Court held in *Texas v. Johnson*, 491 U.S. at 406, to be "conduct

'sufficiently imbued with elements of communication' . . . to implicate the First Amendment." Petitioners assert that this case merits review by this Court because it "involves censorship of a particular type of expression not previously addressed by this Court." Pet. at 6.

The First Circuit, in response to this argument, first noted that "[n]o court has recognized target shooting as a constitutionally protected form of expression," but did not reject the petitioners' argument outright. Rather, noting petitioners' equivalence of such shooting to constitutionally protected flag-burning, the First Circuit assumed without deciding that shooting at targets with a human image "is expressive conduct entitled to some degree of First Amendment protection." Pet. App. 24a-25a. Thus, nothing in the opinion of the First Circuit suggests a reason why the issue presented warrants review by this Court. In any event, even if petitioners can support certiorari on an issue passed by the lower court, the First Amendment claim does not warrant review because the judgment of the court below in no way "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

B. The First Circuit Applied A Settled Standard In Determining That The Act Is Content-Neutral And Satisfies Intermediate Scrutiny.

The First Circuit cited this Court's decision in *Ward v. Rock Against Racism*, 491 U.S. at 791, for its holding that the "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Pet. App. 25a. In determining content neutrality, the court first observed that the Act is content-neutral because "[t]here is an obvious connection between the

Commonwealth's interest in preventing gun fatalities and its decision to restrict the shooting practices of certain gun clubs," in that "[a] person who has practiced shooting at a human-shaped target will likely be more proficient at shooting humans than a person who has had to practice at a circular target." The First Circuit observed that the proscription on shooting at targets with human images applies to both "supporters of tyrants . . . and advocates of freedom." Pet. App. 25a. The court thus correctly concluded that the restriction is content-neutral "neither advancing nor impeding any particular viewpoints, but simply regulating a particular mode of potentially expressive conduct (target shooting) at a particular place (Class A-licensed gun clubs)." Id. at 25a-26a.[7]

Having determined that the Act is content-neutral, the First Circuit went on to apply intermediate scrutiny – the requirement that a statute be "narrowly tailored to serve a significant governmental interest," and that it "allow[] for reasonable alternative channels of communication," citing this Court's decisions in *Ward v. Rock Against Racism* and *Clark v. Community for Creative Non-Violence*. Pet. App. 26a. The First Circuit found that the Act satisfies this standard. It reasoned that preventing those unlicensed

---

[7] Petitioners take issue, claiming that "[t]he legitimate State interest in discouraging murder is served by punishing murder, not by imposing censorship." Pet. at 14. The State Respondents do not dispute the notion that crime should be punished; however, the Massachusetts Legislature may also enact legislation essentially civil in nature to complement the state's criminal laws, as the Legislature did in passing the Act. It is well-settled that, "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the Legislature may think." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1954) (Douglas, J.) (citations omitted).

to use large capacity weapons from becoming proficient at shooting humans is a significant governmental interest;[8] that the restriction is narrowly tailored as it applies only in Class A-licensed gun clubs, which is the only place where a person who does not have a license for a large capacity weapon may shoot such a weapon; and that reasonable alternative channels of communication are available, that is, petitioners can convey their message by a variety of means, even including shooting at images at any place where target shooting is lawful other than gun clubs with a Class A license. Pet. App. 27a-28a.[9]

---

[8] The First Circuit's conclusion that there is an obvious connection between preventing gun fatalities and prohibiting shooting at targets with human images with large capacity weapons has a sound empirical basis. *See People v. Nowos*, 2001 W.L. 736732, * 2 (Mich. Ct. App. 2001), *app. for lv. to app. den.*, 643 N.W.2d 573 (2002) (defendant convicted of manslaughter had practiced shooting with targets of human silhouettes); *Commonwealth v. Appel*, 547 Pa. 171, 689 A.2d 891, 894 (1997) (defendant convicted of murder had practiced shooting with human silhouette targets); *Commonwealth v. Hughes*, 536 Pa. 355, 639 A.2d 763, 768 (1994) (same); *Commonwealth v. Hodge*, 386 Mass. 165, 166, 434 N.E.2d 1246 (1982) (same).

[9] Petitioners contend that, "[t]he political content of this State-imposed message is that private citizens, but not the police, should be pacifists." Pet. at 10. First, the Act conveys no "message," political or otherwise. Moreover, State law enforcement personnel are not exempt from the licensing requirements of Chapter 140.

II. THERE IS NO CONFLICT OF DECISIONS TO WARRANT CERTIORARI.

Petitioners rightly do not contend that review by this Court is necessary to resolve any conflict between the First Circuit's decision and the decision of any other state or federal court. *Cf.* Sup. Ct. R. 10(b), (c) (listing such conflicts as among the "compelling reason[s]" this Court considers in determining whether to grant a petition for a writ of certiorari). As noted above, Massachusetts is the only state that prohibits shooting at targets with a human image. Research has disclosed no other decision by any American court, state or federal, with respect to the constitutionality of a restriction on the use of human image-like targets, and thus there is no conflict of decisions warranting review by this Court.

III. THE MASSACHUSETTS STATUE AT ISSUE IN THIS CASE IS NOT A MATTER OF NATIONAL IMPORTANCE OR APPLICABILITY.

A central consideration applied by this Court in determining whether to grant a petition for a writ of certiorari is whether the question presented is "important," not merely to the parties involved but to the public at large. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955). Contrary to petitioners' assertion that the freedom of expression claim made here is an "important question of federal law that has not been, but should be, settled by this Court," (Pet. at 6), this question has virtually no significance outside of Massachusetts because none of the other 49 states, the District of Columbia, or the Commonwealth of Puerto Rico, has a

prohibition against shooting at targets with a human image.[10] In sum, the question whether shooting at targets with a human image is sufficiently expressive conduct to warrant protection under the First Amendment, is one of significance in Massachusetts alone and apparently nowhere else in the United States. It therefore does not merit review by this Court.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Thomas F. Reilly,
Attorney General
Commonwealth of Massachusetts

Thomas A. Barnico
Counsel of Record
Adam Simms
Deirdre Roney
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

Date: July 19, 2002

---

[10] Petitioners apparently agree, asserting that the Act marks "the first time in world history" that shooting at targets with a human image has been prohibited. Pet. at 6.